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IN THE

Supreme Court of the United States

October Term, 1978

No. **78-1306**

EASTERN PHOTOGRAPHIC LABORATORIES, INC., AND HEART OF AMERICA PORTRAITS, INC.,
Petitioners,

vs.

ROBERTA BRAUNSTEIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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vs.

ROBERTA BRAUNSTEIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Eastern Photographic Laboratories, Inc. and Heart of America Portraits, Inc. (hereinafter collectively referred to as "Eastern") petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered January 24, 1979, affirming the order of the United States District Court for the District of Connecticut entered July 27, 1978.

Opinions Below

The summary order of the Court of Appeals entered on November 17, 1978 (Appendix pp. 5a-6a), is not reported. The decision of the Court of Appeals, dated January 24, 1979 (Appendix pp. 1a-3a), is not yet reported. The order of the District Court, dated July 27, 1978 (Appendix pp. 7a-8a), is not reported.

Jurisdiction

The summary order of the Court of Appeals was entered on November 17, 1978. A timely petition for rehearing and rehearing *en banc* was denied on January 24, 1979 (Appendix p. 4a), and the published decision of the Court of Appeals was filed on January 24, 1979. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether a District Court has the authority to order that notice of the pendency of an action brought by an employee for minimum wages and overtime compensation be given to other similarly situated employees under the so-called "opt-in" provision of section 16(b) of the Fair Labor Standards Act.

Statute Involved

Section 16(b) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 216(b), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Statement of the Case

Eastern is engaged in the business of taking still photographs. It employs approximately one hundred photographers at any one time who travel throughout the eastern United States taking photographs at various large department store chains. Roberta Braunstein is a former employee of Eastern. On July 5, 1978, she filed a complaint in the United States District Court for the District of Connecticut pursuant to section 16(b) of the Fair Labor Standards Act

of 1938, as amended, 29 U.S.C. § 216(b) ("Act" or "FLSA"), alleging that she was acting on behalf of herself and all other similarly situated employees of Eastern and claiming that Eastern had violated the minimum wage and overtime compensation provisions of the FLSA. The jurisdiction of the District Court was invoked under section 16(b) of the FLSA and 28 U.S.C. § 1337. During the course of the pretrial proceedings, the District Court, over Eastern's objection, authorized Braunstein's counsel to give notice to other similarly situated present and former Eastern employees that they might have a claim against Eastern and that they could join the action presently pending in the District Court as plaintiffs. The form of notice Braunstein's counsel proposes to give is printed in the Appendix at pages 21a-27a.

On July 27, 1978, the District Court certified its interlocutory order under 28 U.S.C. § 1292(b) and stayed any notice pending an expedited appeal to the Court of Appeals for the Second Circuit. On November 17, 1978, the Court of Appeals issued a summary order affirming the District Court's order of notice. On January 24, 1979, the Court of Appeals denied Eastern's petition for rehearing but, in recognition of the importance of the issue before it, the Court of Appeals published its previously unpublished summary order of November 17, 1978.

Reasons for Granting the Writ

A. *There Exists a Clear Split Between the Courts of Appeals on this Significant and Far-Reaching Legal Issue.*

As a result of the Second Circuit's affirmance of the District Court's order, there is a clear split on this issue between the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit. *Kinney Shoe*

Corp. v. *Vorhes,* 564 F.2d 859 (9th Cir. 1977). *Kinney,* like the present action, was a suit for unpaid minimum wages and overtime compensation pursuant to section 16(b) of the FLSA. As in the instant case, *Kinney* was brought by the plaintiffs on behalf of themselves and all other similarly situated employees of Kinney. Shortly after the action was filed, the District Court authorized the plaintiff employees to give notice of the pendency of the action to all other similarly situated present and former employees of Kinney to advise them of their right to join the pending suit. In a comprehensive opinion, the Ninth Circuit rejected the plaintiffs' arguments that there were statutory and constitutional requirements for notice to other similarly situated employees in a section 16(b) FLSA action and that, even in the absence of such requirements, a District Court had inherent powers to order such notice.

At the outset of its opinion, the Ninth Circuit emphasized that the action before it was being prosecuted under section 16(b) of the FLSA and not under Rule 23 of the Federal Rules of Civil Procedure. The Ninth Circuit pointed out that the so-called class action under section 16(b) was not a true class action at all but was similar to the old "spurious" class action, a device which has been universally recognized as nothing more than a mechanism for permissive joinder. *See, e.g., Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 560 (2d Cir. 1968). Unlike true class actions, where absent members of the class are bound by the judgment, the Ninth Circuit noted that when a section 16(b) plaintiff brings an action on behalf of himself and other similarly situated employees, no employee will be bound by the judgment unless he joins the action as a party plaintiff. In rejecting the suggestion that Rule 23 notice was appropriate in a section 16(b) action, the Ninth Circuit stated that the "clear weight of authority holds that Rule 23 pro-

cedures are inappropriate for the prosecution of class actions under § 216(b)." 564 F.2d at 863.

In *Kinney* the Ninth Circuit also considered and rejected the argument that even if Rule 23 were itself inapplicable, the District Court should "nevertheless permit a Rule 23-type notice to facilitate the opting-in of potential class members." 564 F.2d at 862. The Court of Appeals for the Ninth Circuit pointed out that plaintiffs' argument confused the *effect* of notice in class actions with the *purpose* of such notice. While the giving of notice in class actions undoubtedly serves to alert a person that he may be sitting on a legal claim, the Ninth Circuit observed that the purpose of class notice is to provide the due process without which any subsequent judgment might not be binding. Since only parties are bound by the judgment in section 16(b) litigation, the Ninth Circuit concluded that a provision authorizing class notice in such litigation was unnecessary. Citing a number of District Court decisions on point, the Ninth Circuit endorsed the view that the failure of Congress to include a notice provision in section 16(b) cannot be attributed to mere oversight. As further support for its conclusion that the authorization of notice in section 16(b) litigation would be inconsistent with the intent of Congress, the Ninth Circuit cited the passage of the Age Discrimination in Employment Act of 1967 ("ADEA").[1] It pointed out that when Congress passed the ADEA in 1967, new Rule 23 was in effect, yet it nevertheless chose to use the enforcement procedures of the FLSA. In adopting the reasoning of the District Court in *McGinley* v. *Burroughs Corp.*, 407 F. Supp. 903, 911 (E.D. Pa. 1975), the Ninth Circuit concluded that in light of the clearly stated applica-

1. The ADEA provides in 29 U.S.C. §626(b) that the provisions of that Act are to be enforced "in accordance with the powers, remedies and procedures" provided in sections 16(b), 16(c) and 17 of the Fair Labor Standards Act. 29 U.S.C. §§216 & 217.

bility of section 16(b) to ADEA actions and the absence of any reference to Rule 23, the adoption of Rule 23 or any of its procedures in section 16(b) litigation would be contrary to the intent of Congress.

The Ninth Circuit also cited its earlier opinion in *Pan American World Airways, Inc.* v. *United States District Court,* 523 F.2d 1073, 1077 (9th Cir. 1975), for the propositions that a District Court has no "residual power" pursuant to the Federal Rules of Civil Procedure to authorize such notice, and that there exists no constitutional right to notify potential plaintiffs of pending litigation they may wish to join. 564 F.2d at 863-64. Lastly, the Ninth Circuit stated that it shared the concern articulated by other courts that the procedure urged by plaintiff would involve "either [the] plaintiff or [the] court in the stirring up of litigation and the solicitation of claims." 564 F.2d at 863.

The Second Circuit's decision on this issue is also in conflict in principle with the Courts of Appeals in the Fifth and Eighth Circuits. *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975); *Schmidt* v. *Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975). *LaChapelle* involved the question of whether an age discrimination suit brought pursuant to section 16(b) of the FLSA could be maintained as a Rule 23-type class action. The Fifth Circuit held that a section 16(b) action and a Rule 23 action were fundamentally different and ruled that the provisions of Rule 23 could not be invoked in section 16(b) actions. In *Schmidt* the Eighth Circuit reversed a District Court's order authorizing the circulation of notice to other similarly situated employees in an FLSA action on the ground that the District Court did not have the power to order Rule 23 notice in a section 16(b) FLSA action. In its opinion, the Eighth Circuit, in commenting on the appropriateness of a petition

for mandamus in such a situation, stated, "[n]otice from the court to potential plaintiffs not authorized explicitly by statute or rule is so extraordinary that review of such actions by mandamus will not frustrate the congressional policy permitting appeals only from final judgments." 527 F.2d at 535. While the issue before the Eighth Circuit was limited to the availability of Rule 23 notice in a section 16(b) action, in a footnote the *Schmidt* court expressed serious doubt about the authority of the District Court to order any notice in a section 16(b) action and advised the District Court to certify the issue to it in the event such an order were subsequently entered. 527 F.2d at 537n.5.

B. *The Question Presented is an Important Issue of First Impression in the Administration of the FLSA, the ADEA and the Equal Pay Act.*

The Second Circuit's ruling authorizing notice in a section 16(b) FLSA action not only affects actions under the FLSA for minimum wages and overtime compensation, but also radically alters the enforcement mechanisms for two other important federal statutes, the ADEA and the Equal Pay Act.[2] Thus, until this Court finally resolves the question of whether notice may be given in a section 16(b) action, the private enforcement mechanisms for three different federal statutes will be interpreted differently by District Courts across the country. On the one hand, the District Courts which follow the Second Circuit will permit notice to be given and, in effect, convert such actions into Rule 23-type class actions. On the other hand, the District Courts which follow *Kinney* will recognize section 16(b) as providing nothing more than a device to facilitate permissive joinder, and will refuse to use the procedure of class notice in a manner in which it was never intended to be used.

2. The Equal Pay amendments, 29 U.S.C. §206(d), were added to the Fair Labor Standards Act in 1963, and these amendments provide for enforcement pursuant to sections 16(b), 16(c) and 17 of the FLSA. 29 U.S.C §206(d)(3). See note 1 *supra*.

C. *The Decision of the Second Circuit Sanctions a Significant and Far-Reaching Departure from the Accepted Course of Judicial Proceedings.*

In addition to altering dramatically the shape of thousands of future actions for minimum wages, age discrimination, and equal pay, the Second Circuit's decision holds the potential for radically altering the traditional and time-honored role of the judiciary in this country by permitting a District Court to give notice of the pendency of any action to any person who qualifies for permissive joinder.[3] Thus,

3. At the time the FLSA was passed by Congress in 1938, old Rule 23 was in effect. The courts have uniformly held that the language of section 16(b) permitting an employee to bring an action on behalf of himself and other employees similarly situated was intended by Congress to create a form of action in the nature of a "spurious" class action, an action which is characterized by the fact that only parties to the action are bound. *McComb* v. *Frank Scerbo & Sons*, 177 F.2d 137 (2d Cir. 1949); *Kinney Shoe Corp.* v. *Vorhes, supra; Schmidt* v. *Fuller Brush Co., supra; LaChapelle* v. *Owens-Illinois, Inc., supra; Fuentes* v. *Chase Manhattan Bank*, F. Supp. 84 Lab. Cas. (CCH) ¶33,701 (S.D.N.Y. 1978); *McGinley* v. *Burroughs Corp., supra; Roshto* v. *Chrysler Corp.*, 67 F.R.D. 28 (E.D. La. 1975); *Bradford* v. *Peoples National Gas Co., Inc.*, 60 F.R.D. 432 (W.D. Pa. 1973); *Maguire* v. *Trans World Airlines*, 55 F.R.D. 48 (S.D.N.Y. 1972). *Cf. Cherner* v. *Transitron Electronic Corp.*, 201 F. Supp. 934 (D. Mass. 1962). *See* 3B Moore's *Federal Practice* ¶23.10[4], at 23-2671 to 2674 (2d. ed. 1974); 7 Wright & Miller, *Federal Practice and Procedure* §1752, at 528-29 (1972 ed.). Further, it has long been recognized that a "spurious" class action is nothing more than a device for permissive joinder. *Eisen* v. *Carisle & Jacquelin, supra; Carroll* v. *American Fed'n of Musicians*, 372 F.2d 155 (2d Cir. 1967), *vacated on other grounds*, 391 U.S. 99 (1968); *All-American Airways* v. *Elderd*, 209 F.2d 247 (2d Cir. 1954); *California Apparel Creators* v. *Wieder of California, Inc.*, 162 F.2d 893 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947). *See* 3B Moore, *supra* ¶23.10[1], at 23-2602 to 2603. Indeed, if the FLSA were enforceable only in federal courts, the language in question would have been omitted by Congress in view of the liberal joinder provisions of the Federal Rules of Civil Procedure. *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 853 (3rd Cir. 1945).

unless this Court is prepared to countenance the giving of notice in any situation where permissive joinder would be appropriate under Rule 20 of the Federal Rules of Civil Procedure,[4] it should grant certiorari and exercise its power of supervision over the Court of Appeals for the Second Circuit.

D. Certiorari Should be Granted to Correct a Clear Error of Law Below.

The Second Circuit's decision is at odds with the overwhelming weight of authority on this issue. *Kinney Shoe Corp.* v. *Vorhes, supra; Wagner* v. *Loew's Theatres Inc.*, 76 F.R.D. 23 (M.D.N.C. 1977); *Hill* v. *Western Electric Co.*, 76 F.R.D. 4 (M.D.N.C. 1976); *Locascio* v. *Teletype Corp.*, 74 F.R.D. 108 (N.D. Ill. 1977); *Roshto* v. *Chrysler Corp., supra; American Finance System, Inc.* v. *Harlow*, 65 F.R.D. 94 (D. Md. 1974); *Paddison* v. *Fidelity Bank*, 60 F.R.D. 695 (E.D. Pa. 1973). Further, the authorities cited

4. It should also be noted that the purported exercise of power by a District Court as to parties who have not yet submitted their claims to the court raises serious questions concerning the limitations imposed by Article III, section 2 of the Constitution. As noted in *Pan American World Airways, Inc.* v. *United States District Court, supra* at 1077n.3:

> Traditionally in our judicial system, courts are powerless to act until litigants bring claims before them. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 326, 361, 9 L.Ed. 905 (1824) (Marshall, C.J.) (dictum). The issuance of notice to potential plaintiffs offends this principle in two ways: first, it permits a court to act upon a claim before it becomes the subject of a lawsuit; and second, it permits a court to acquire jurisdiction by encouraging lawsuits. So sharp a deviation from the traditional role of the judiciary requires justification. Resort to a residual power of unspecified origin is insufficient.

See also *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U.S. 249, 259 (1933); *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911) and cases cited therein; *Southern Pacific Co.* v. *McAdoo*, 82 F.2d 121, 122 (9th Cir. 1936).

by the Second Circuit as contrary precedent in support of its ruling that the circulation of notice in a section 16(b) action is appropriate are not rulings based upon a consideration of the issues. They are simply District Court orders unaccompanied by opinions that indicate that the issues involved were contested or even considered by the courts.[5]

5. *Cantu* v. *Owatonna Canning Company, Inc.*, Docket No. 3-76-Civ. 374 (D. Minn. April 12, 1978), is an unreported order authorizing notice in a section 16(b) action, a copy of which appears in the Appendix at pages 9a-10a. There is no indication that the District Court ever addressed itself to the issue before this Court. Indeed, it is unlikely that the issue was even considered by the court, since, contrary to the Eighth Circuit's admonition in *Schmidt* v. *Fuller Brush Co., supra at* 537n.5, some three years earlier, the court failed to certify the issue to the Eighth Circuit for interlocutory review. In any event, in view of the Eighth Circuit's decision in *Schmidt* v. *Fuller Brush Co., supra, Cantu* cannot be regarded as the law of the Eighth Circuit. In *Lantz* v. *B-1202 Corp.*, 429 F. Supp. 421 (E.D. Mich. 1977), again there is no indication that the defendants objected to the circulation of notice or that the District Court gave any consideration to whether notice of the pendency of the action to other potential plaintiffs was proper in a section 16(b) action. The District Court, without any discussion, simply granted plaintiffs' motion for an order authorizing the circulation of notice. As in *Cantu*, it is extremely unlikely that the issue was ever raised, since there is no mention in the District Court's memorandum opinion of any of the large number of section 16(b) "notice" cases. *Gomez* v. *Buckeye Sugars, Inc.*, Docket No. C 73-41 (N.D. Ohio 1973), is another unreported order authorizing the issuance of notice in a section 16(b) action, a copy of which appears in the Appendix at pages 18a-20a. It is apparent, however, that even if the District Court did consider the issue, it completely misapprehended the critical difference between a section 16(b) action and a Rule 23(b)(3) class action where due process requires that absent class members receive notice because they will be bound by the judgment unless they opt-out. In *Gomez* the "Legal Notice To Sugarbeet Workers" which is printed in the Appendix at pages 13a-17a clearly shows that the court erroneously thought that all employees of Buckeye Sugars would be bound by the judgment unless, as in a Rule 23 class action, they opted-out. It is apparent, therefore, that *Gomez* does not provide any support for the issuance of notice in a section 16(b) action.

In construing section 16(b) of the FLSA as permitting a District Court to give notice of the pendency of an action to potential plaintiffs, the Second Circuit failed to abide by the cardinal principle of statutory construction which requires a court to discover and carry out legislative purposes and not inject its own notion of desirable policy under the guise of statutory interpretation. *Sixty-two Case of Jam* v. *United States,* 340 U.S. 593 (1951); *Iselin* v. *United States,* 270 U.S. 245 (1926); *Ebert* v. *Poston,* 266 U.S. 548 (1925). It is axiomatic that a court must take the statute as framed and may not add words to the statute to make the statutory remedy more effective. *Anderson* v. *Wilson,* 289 U.S. 20 (1933). In the present action, the fact that Congress did not provide for notice when it enacted the FLSA in 1938 is totally consistent with the strong policy considerations that long have militated in favor of the rule that potential plaintiffs in a "spurious" class action, a device which is nothing more than permissive joinder, are not entitled to notice of the pendency of the action. *See, e.g., Cherner* v. *Transitron Electronic Corp., supra.* This historical perspective, coupled with the numerous opportunities that Congress has had to provide for notice if it so chose,[6] leads one to the inevitable conclusion

6. Section 16(b) of the FLSA has been amended by Congress five times since 1938. The form and scope of section 16(b) were limited significantly by Congress in 1947 in its Portal-to-Portal Act amendments. Ch. 52, 61 Stat. 84, now 29 U.S.C. §§ 251-262. Section 16(b) was also amended in 1961 to provide that the private right of action terminated upon the filing of a section 17 injunction proceeding against the employer by the Secretary of Labor. Act of May 5, 1961, Pub. L. 87-30, 812(b), 75 Stat. 74, now 29 U.S.C. § 216. In 1963, Congress enacted the Equal Pay Act, 29 U.S.C. § 206(d), and provided for private enforcement pursuant to section 16(b). In 1967, Congress passed the ADEA and again provided for private enforcement pursuant to section 16(b) of the FLSA. 29 U.S.C. § 626(b). In 1978, Congress comprehensively amended the ADEA and, among other things, provided for jury trials in private actions. 29 U.S.C. § 626(c)(2).

that the omission of notice in the FLSA was not a congressional oversight. *See Moor* v. *County of Alameda,* 411 U.S. 693, 709 (1973) ("[I]n interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 . . . ; rather, we must construe the statute in light of the impressions under which Congress did in fact act . . . ."); *United States* v. *Wise,* 370 U.S. 405, 411 (1962) ("[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage.").

Not surprisingly, the courts that have considered Congress' intent in this regard have held that the omission of notice in the FLSA was the result of a conscious choice by Congress. *Kinney Shoe Corp.* v. *Vorhes, supra; McGinley* v. *Burroughs Corp., supra; Roshto* v. *Chrysler Corp., supra; Wagner* v. *Loew's Theatres, Inc., supra; Hill* v. *Western Electric Co., supra.* For the Second Circuit to conclude otherwise it had to ignore the realities surrounding the enactment of this legislation some forty years ago and, under the aegis of statutory construction, to legislate by judicial fiat a change in the statute to bring it into conformity with the Second Circuit's view of modern-day concepts of judicial efficiency. That, however, is the function of Congress, not the courts. *Anderson* v. *Wilson, supra; Iselin* v. *United States, supra.*

In construing section 16(b) of the FLSA, the Second Circuit also failed to take into consideration the fact that Congress has reviewed the enforcement mechanisms for the FLSA twice since 1972—in 1974, to broaden the Secretary of Labor's enforcement powers under section 16(b) to permit him to bring actions at law for damages (29 U.S.C. § 216(c)) and, as noted earlier herein, in 1978, to incorporate expressly this Court's holding in *Lorillard* v. *Pons,* 434 U.S. 575, 580-81 (1978), that jury trials are available to plaintiffs in private actions brought pursuant to section 16(b) of the

FLSA. 29 U.S.C. § 626(c)(2). At the time of these congressional reviews of the enforcement mechanisms of the FLSA, the great weight of authority was that notice to potential plaintiffs was not part of the FLSA's enforcement procedures. See cases collected at page 10 of this petition. As this Court recently noted when construing the identical section of the FLSA in *Lorillard* v. *Pons,* "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statutes." 434 U.S. at 581.

Further, the Second Circuit's heavy reliance on the "opt-in" provision of section 16(b) to justify its construction of the statute as permitting notice to potential section 16(b) plaintiffs is not only misplaced, but also betrays a total lack of understanding of the legislative history of that section of the Act. The requirement that a written consent be filed by any employee who wishes to become a plaintiff in a pending section 16(b) action was included as part of Congress' comprehensive effort in its Portal-to-Portal Act amendments to the FLSA in 1947 to remedy some of the inequitable effects of the Act. *See* 29 U.S.C. § 251; *McComb* v. *Frank Scerbo & Sons, supra.* Contrary to the Second Circuit's assumption, the requirement that written consents be filed, the so-called "opt-in" provision, was not an effort by Congress to encourage joinder in section 16(b) actions but, quite to the contrary, was a corrective device that Congress devised to prevent the assertion of surprise claims by unnamed employees after the statute of limitations would otherwise have run.[7] *Gibbons* v. *Equitable Life Ins. Soc'y,*

7. Prior to the Portal-to-Portal Act amendments in 1947, the filing of a section 16(b) action by an employee on behalf of himself and other employees similarly situated tolled the statute of limitations for all such similarly situated employees. The Portal-to-Portal Act amendments changed that rule by providing that the statute of limitations continued to run against all unnamed employees until they filed written consents to become party plaintiffs in the pending action. The motivating force behind this amendment was Congress' concern over the tremendous potential liability employers had under the FLSA when an employee brought suit on behalf of himself and other similarly situated employees. In an effort to reduce that exposure, Congress chose to adopt a short uniform federal statute of limitations for all FLSA actions and provided that the statute of limitations would continue to run against all employees who failed to join as party plaintiffs in the pending action. [1947] U.S. Congressional Service 1030-1036; 3B Moore, *supra* at 23-2673 to 2674; 29 U.S.C. §256.

173 F.2d 337 (2d Cir. 1949); *Brown* v. *Dunbar & Sullivan Dredging Co.,* 189 F.2d 871 (2d Cir. 1951).

Finally, the very brevity of the Second Circuit's opinion makes it clear that the Court of Appeals' analysis in this matter amounted to little more than a reading of the language of the statute. Apparently, without any consideration of the Act's legislative history, or appreciation of the enormous impact of its ruling, the Second Circuit, in one short stroke of the pen, radicalized the procedures provided by Congress for implementing the FLSA, the ADEA and the Equal Pay Act, and in the name of judical economy broke with more than two hundred years of judicial precedent which prohibits a court from acting with respect to cases and controversies not before it.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHAUN S. SULLIVAN
Attorney for Petitioners.

Of Counsel:

WILLIAM J. DOYLE
MARSHALL B. BABSON

February 22, 1979.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 411—August Term, 1978.

(Argued November 17, 1978 Decided November 17, 1978;
Opinion filed January 24, 1979.)

Docket No. 78-7464

ROBERTA BRAUNSTEIN,

Plaintiff-Appellee,

vs.

EASTERN PHOTOGRAPHIC LABORATORIES, INC.
and HEART OF AMERICA PORTRAITS, INC.,

Defendants-Appellants.

Before:

WATERMAN, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) (1976), from an order entered in the District of Connecticut, T. F. Gilroy Daly, *District Judge,* overruling objections to discovery and to circulation of a notice of pendency of a Fair Labor Standards Act action, 29 U.S.C. § 216(b) (1976), to other "opt-in" members of the class.

Affirmed.

SHAUN S. SULLIVAN, New Haven, Conn. (William J. Doyle, Marshall B. Babson, and Wiggin & Dana, New Haven, Conn., of counsel), *for defendants-appellants.*

A. REYNOLDS GORDON, Bridgeport, Conn., *for plaintiff-appellee.*

PER CURIAM:

We affirmed by our order entered November 17, 1978 the order of the district court from which an appeal was taken and which appeal was expedited by a prior order of our Court entered September 21, 1978. In light of the petition for rehearing by defendants-appellants addressed to the panel that heard this appeal on the merits and in accordance with our practice in appropriate cases of publishing previously unpublished decisions or orders of this Court, *Continental Stock Transfer & Trust Co.* v. *SEC,* 566 F.2d 373 (2 Cir. 1977) (per curiam), we now publish the following opinion in the instant case which in substance is our order filed on November 17, 1978.

The essential issue raised on this appeal is whether a district court has the power to order that notice be given to other potential members of the plaintiff class under the "opt-in" provision of the Fair Labor Standards Act dealing with actions for nonpayment of statutorily required minimum wages and overtime compensation. 29 U.S.C. § 216(b) (1976).

We believe that Judge Daly took the proper course in authorizing notice to other potential plaintiffs in this action under the Fair Labor Standards Act. Although one might read the Act as not providing for notice by deliberate omission, we hold that it makes more sense, in light of the "opt-in" provision of § 16(b) of the Act, 29 U.S.C. § 216(b), to read the statute as permitting, rather than prohibiting, notice in an appropriate case. *Cantu* v. *Owatonna Canning Co.,* Docket No. 3-76-Civ. 374 (D. Minn. April 12, 1978); *Lantz* v. *B-1202 Corp.,* 429 F.Supp. 421 (E.D. Mich. 1977); *Gomez* v. *Buckeye Sugars, Inc.,* Docket No. C73-41 (N.D. Ohio 1973). *Contra, Kinney Shoe Corp.* v. *Vorhes,* 564 F.2d 859 (9 Cir. 1977). Although we agree with Judge Choy's view in *Kinney* that due process does not require notice,

we do not agree with his conclusion that there is no power in the district court to order it in a proper case.

In our view, this holding comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits. In short, we believe that the recent trend in the law, *see, e.g., Bates & O'Steen* v. *State Bar of Arizona,* 433 U.S. 350 (1976), strips Judge Wyzanski's rationale of a decade and a half ago in *Cherner* v. *Transitron Electronics Corp.,* 201 F.Supp. 934 (D. Mass. 1962), of much of its force—a rationale which in any event is not controlling on this Court.

Aside from publishing our opinion above, the petition for rehearing is in all respects denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and seventy-nine.

Docket No. 78-7464

ROBERTA BRAUNSTEIN,
Plaintiff-Appellee,

vs.

EASTERN PHOTOGRAPHIC LABORATORIES, INC.
and HEART OF AMERICA PORTRAITS, INC.,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendants-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is Denied.

IRVING R. KAUFMAN,
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of November, one thousand nine hundred and seventy-eight.

Present:

HON. STERRY R. WATERMAN
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

Docket No. 78-7464

ROBERTA BRAUNSTEIN,
Plaintiff-Appellee,

vs.

EASTERN PHOTOGRAPHIC LABORATORIES, INC.
and HEART OF AMERICA PORTRAITS, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is *affirmed.*

The essential issue raised on this appeal is whether a district court has the power to order that notice be given to

other potential members of the plaintiff class under the "opt-in" provision of the Fair Labor Standards Act dealing with suits for nonpayment of statutorily required minimum wages and overtime compensation, 29 U.S.C. § 216(b).

We believe that Judge Daly took the proper course in authorizing notice to other potential plaintiffs in this Fair Labor Standards Act suit. Although one might read the FLSA as not providing for notice by deliberate omission, we hold that it makes more sense, in light of the "opt-in" provision of § 16(b) of the Act, 29 U.S.C. § 216(b) (1976), to read the statute as permitting, rather than prohibiting, notice in an appropriate case. *Cantu* v. *Owatonna Canning Co.*, Docket No. 3-76-Civ. 374 (D. Minn. April 12, 1978); *Lantz* v. *B-1202 Corp.*, 429 F.Supp. 421 (E.D. Mich. 1977); *Gomez* v. *Buckeye Sugars, Inc.*, Docket No. C73-41 (N.D. Ohio 1973). *Contra Kinney Shoe Corp.* v. *Vorhes*, 564 F.2d 859 (9 Cir. 1977). Although we agree with Judge Choy's view in *Kinney* that due process does not require notice, we do not agree with his conclusion that there is no power in the district court to order it in a proper case.

In our view, this holding comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits. In short, we believe that the recent trend in the law, *see, e.g., Bates & O'Steen* v. *State Bar of Arizona*, 433 U.S. 350 (1976), strips Judge Wyzanski's rationale of a decade and a half ago in *Cherner* v. *Transitron Electronics Corp.*, 201 F.Supp. 934 (D. Mass. 1962), of much of its force—a rationale which in any event is not controlling on this Court.

STERRY R. WATERMAN
WILLIAM H. TIMBERS
ELLSWORTH A. VAN GRAAFEILAND

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. B-78-252

ROBERTA BRAUNSTEIN,
Plaintiff,

vs.

EASTERN PHOTOGRAPHIC LABORATORIES, INC.;
HEART OF AMERICA PORTRAITS,
Defendant.

RULING ON DEFENDANTS' OBJECTION TO DISCOVERY AND TO NOTICE TO POTENTIAL CLASS MEMBERS

The above motion was denied from the bench after oral argument, a review of the parties memoranda, and an examination of the authorities cited by the parties. The bases of this denial were set forth at that time. This order is intended to elaborate on the propriety of an interlocutory appeal from the Court's ruling.

Defendants' motion turned on the resolution of two questions. First, does a District Court have the authority to order the circulation of notice to potential members of a 29 U.S.C. § 216(b) class? Secondly, once a plaintiff has received through discovery a list of employees who may wish to opt into the class, can a District Court prevent the use of the list without violating plaintiff's First Amendment rights? There is a substantial ground for difference of opinion over the resolution of these issues and I believe

an immediate appeal from my ruling will materially advance the ultimate termination of this suit. Moreover, the research of the parties and the Court indicates that both of the issues are unresolved in the Second Circuit. For the above reasons, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is appropriate.

Dated at Bridgeport, Connecticut this 27th day of July, 1978.

T. F. Gilroy Daly
United States District Judge

Order

UNITED STATES DISTRICT COURT
District of Minnesota
Third Division

No. 3-76-Civ. 374

Ignacio Cantu, et al,
Plaintiffs,

vs.

Owatonna Canning Company, Inc., et al,
Defendants.

Plaintiffs have moved for an amendment of the Order of October 14, 1976, to permit plaintiffs' attorneys to contact members of the proposed class concerning potential claims under the Fair Labor Standards Act. Attorneys for plaintiffs and defendants have submitted memoranda and oral argument on this motion to the Court. The Court has carefully considered the arguments of counsel.

It is Ordered:

That Paragraph 5 of the Order of October 14, 1976, is amended by the addition of the following provision:

> Provided Further, that plaintiffs' attorneys may institute procedures to contact all migrant farmworkers employed by Owatonna Canning Company in 1975 or 1976 for the limited purposes of informing these workers of the protections of the Fair Labor Standards Act, that this suit has been filed and they may join this suit by filing a consent with the Court,

and that they may retain their own attorneys or contact legal services attorneys to represent their interests under the Fair Labor Standards Act.[1]

/s/ Earl R. Larson

United States Senior District Judge

April 12, 1978.

1. The Court understands that the parties will be able to agree upon the form of notice and the procedures for handling the notice. This Order is not to be construed to interfere with reasonable stipulations of the parties.

Filed June 26, 1973

ORDER

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

Civil No. C 73-41

Juan Gomez, et al.,

Plaintiffs,

vs.

Buckeye Sugars, Inc., et al.,

Defendants.

This cause came to be heard upon the submission by the parties of proposed notices to the respective classes in conformity with the pretrial order entered in this matter. For good cause appearing, it is

Ordered that the notices attached hereto shall be the notices given to the respective classes, and it is

Further Ordered that the parties shall make such language translations of the notices as they deem desirable, and it is

Further Ordered that the parties shall proceed with all dispatch to notify the prospective members of each class, and it is

FURTHER ORDERED THAT SHOULD THE PARTIES DISAGREE as to the method of providing notice to either class they shall inform the Court as to the nature of their disagreement within ten (10) days from the filing of this order.

DON J. YOUNG
United States District Judge

Toledo, Ohio.

A true copy

Attest: Dominic J. Cimino, Clerk

By BEATRICE L. REIHING
Deputy Clerk

Legal Notice to Sugarbeet Workers

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C 73-41

JUAN GOMEZ, et al.,

Plaintiffs,

vs.

BUCKEYE SUGARS, INC., et al.,

Defendants.

To all sugarbeet workers who within the last three years have been employed by grower members of the Ottawa Employment Committee, Inc. of Ottawa, Ohio, which members have within the past three years sold sugar beets to Buckeye Sugars, Inc. of Ottawa, Ohio.

A lawsuit has been filed in the United States District Court for the Northern District of Ohio, Western Division, in Toledo, Ohio, by two sugarbeet workers against Buckeye Sugars, Inc., Ottawa Employment Committee and all growers who have been members of Ottawa Employment Committee and sold sugar beets to Buckeye Sugars within the past three years. These two sugarbeet workers are suing on their own behalf, and on behalf of a class of all other sugarbeet workers who have worked for growers who were members of Ottawa Employment Committee and who sold sugar beets to Buckeye Sugars.

If you have been a sugarbeet worker, employed within the past three years by grower members of Ottawa Employ-

ment Committee who sold sugar beets to Buckeye Sugars, Inc., then you have tentatively been determined to be a member of the class that is suing.

The sugarbeet workers who brought this lawsuit are represented by attorneys connected with the Ohio Migrant Legal Action Program, 1616 East Wooster, Bowling Green, Ohio, 43502. Telephone number is: Area Code 419—352-4625. These sugarbeet workers are claiming that they were paid on a basis which resulted in their earning less than $1.30 per hour, and they are trying to recover back wages.

IF YOU WISH TO MAKE A CLAIM for not earning at least $1.30 per hour, YOU MUST sign the form headed NOTICE OF CONSENT attached to this notice and mail it to the Office of the Clerk, 1716 Spielbusch Avenue, Toledo, Ohio 43624 not later than September 30, 1973; or you may contact the Ohio Migrant Legal Action Program for assistance in doing so.

The lawsuit is also brought to have the Court determine the rights of sugarbeet workers by resolving the following questions:

(1) Are Buckeye Sugars and Ottawa Employment Committee responsible along with the growers, for compliance as joint employers with the requirements of the Fair Labor Standards Act?

(2) Is Ottawa Employment Committee a farm labor contractor under federal law, and has it complied with the law in that respect?

(3) Did Ottawa Employment Committee or Buckeye Sugars make improper deductions from wages of sugarbeet workers?

(4) Did Buckeye Sugars, Ottawa Employment Committee and the growers improperly fail to pay wages to sugarbeet workers on a semi-monthly basis? Did Buckeye Sugars, Ottawa Employment Committee, or the growers retaliate or discriminate against, or threaten sugarbeet workers for exercising their rights under federal or state law?

YOU WILL BE INCLUDED IN AND BOUND by the judgment rendered by the Court on all issues in the case except individual claims for back wages whether it is favorable or unfavorable UNLESS YOU INFORM the Court not later than September 30, 1973 that you request to be excluded.

IF YOU WANT TO BE EXCLUDED from membership in the class, you must complete and sign the form headed REQUEST FOR EXCLUSION attached to this notice and mail it to the Office of the Clerk, 1716 Spielbusch Avenue, Toledo, Ohio, 43624 not later than September 30, 1973.

IF YOU DO NOT WANT TO BE EXCLUDED, but want to have your own lawyer represent you, you should instruct him to enter your appearance, but you do not have to have a lawyer unless you wish to have one. If you cannot afford the services of a private attorney, you may request legal assistance from the Ohio Migrant Legal Action Program.

This notice is not a determination of the merits of the claims asserted and is only a preliminary procedural order to determine the identity of the parties. There is no assurance that the Court will grant any relief in the case.

No one can discriminate or retaliate against you for taking part in this action.

DON J. YOUNG
United States District Judge

NOTICE OF CONSENT
Civil No. C73-41

JUAN GOMEZ, et al.,

Plaintiffs,

vs.

BUCKEYE SUGARS, INC., et al.,

Defendants.

I hereby CONSENT to being a member of the class of parties to the above action.

Name .....

Address .....

.....

Return this form to
Office of the Clerk—Room 201
U.S. Court House & Custom House
1716 Spielbusch Avenue
Toledo, Ohio 43624

REQUEST FOR EXCLUSION
Civil No. C73-41

JUAN GOMEZ, et al.,

Plaintiffs,

vs.

BUCKEYE SUGARS, INC., et al.,

Defendants.

I hereby request to be excluded from the class of parties plaintiff to the above action.

Name .....

Address .....

.....

Return this form to
Office of the Clerk—Room 201
U.S. Court House & Custom House
1716 Spielbusch Avenue
Toledo, Ohio 43624

FILED JULY 25, 1973

Order

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JUAN GOMEZ, et al.,

Plaintiffs,

vs.

BUCKEYE SUGARS, INC., et al.,

Defendants.

Pursuant to this Court's Order of June 26, 1973, with the Court being fully advised in the premises, and with the Counsel for the respective parties stipulating and agreeing as to the method of providing notice to the respective classes, it is hereby ORDERED, ADJUDGED, AND DECREED that the Notice to the Plaintiff and Defendant Classes shall be distributed in the following manner:

A. *Plaintiff Class*

1. Copies of the Legal Notice to Sugarbeet Workers, attached hereto as Appendices A and B, shall be forwarded to the offices of the County Welfare Departments, Ohio Bureau of Employment Services, and migrant health clinics located in Williams, Fulton, Lucas, Defiance, Henry, Wood, Paulding, Putnam, Hancock, VanWert, Allen, Hardin, Wyandot, Mercer, Auglaize, Seneca, Sandusky, Ottawa, and Huron Counties by Counsel for the Plaintiffs. A copy of the Notice, in both English and Spanish language, shall be conspicuously posted in each of these offices by an

employee of said office, with copies of said Notice also to be available for distribution to any sugarbeet worker who visits said office. The posting and distribution of said Notice shall continue until September 30, 1973; and

2. Counsel for Ottawa Employment Committee shall provide Plaintiffs' Counsel with the names and addresses of all migrant sugarbeet workers which it has in its possession. Plaintiffs Counsel shall then forward a copy of the Notice to said individuals via regular mail.

B. *Defendant Class*

1. Counsel for Ottawa Employment Committee shall provide Plaintiff's Counsel with the names and addresses of all grower members of Ottawa Employment Committee. Plaintiffs' Counsel shall then forward a copy of the Legal Notice to Sugarbeet Growers, attached hereto as Appendix C, to said individuals via regular mail.

DON J. YOUNG

United States District Court
Judge

[Signature Illegible]

Counsel for Plaintiffs Gomez
and Lopez

[Signature Illegible]

Counsel for Defendant Buckeye
Sugars, Inc.

[Signature Illegible]

Counsel for Defendant Ottawa Employment Committee, Inc.

C. David Cox, Jr.

Counsel for Defendant Robert Christman

[Signature Illegible]

Counsel for Defendant Lawrence Gerken

A true copy

Attest: Dominio J. Cimino, Clerk

By Beatrice L. Rolhing
Deputy Clerk

[Letterhead of Gordon and Hiller]

July 24, 1978

TO ALL PHOTOGRAPHERS EMPLOYED BY
EASTERN PHOTOGRAPHIC LABORATORIES, INC.

or

HEART OF AMERICA PORTRAITS, INC.

Dear Photographers:

We represent Roberta Braunstein of Monroe, Connecticut. Roberta has brought a class action, on behalf of herself and all of the other photographers (approximately 463 in number) who have worked at Eastern (or Heart) during the past three years. The action is for unpaid overtime and minimum wage violations under Federal law.

Overtime Pay

Under the Federal Fair Labor Standards Act employees must be paid time and one-half for all hours over 40 hours per week. Working hours would include set-up time, break-down time, travel for assignments away from home (including transportation of equipment) and other categories, including travel back to the company plant on Mondays. Aided by her memory and her records, Roberta has calculated, under our supervision, the details of her employment and the amounts of overtime pay which are owing. Although her average work week approximated 55-60 hours, overtime was never considered, and Roberta was seldom compensated for her long hours.

Calculations

Examining the complaint which is enclosed, and the schedules which accompany the complaint, you will see that Roberta's unpaid compensation averages more than $50 per week. We believe that she is entitled to collect $1,834 overtime for the 33 weeks which she worked, as calculated on Schedule 3C. In addition, as penalty, the Fair Labor Standards Act provides that the Court may award an additional sum equal to the overtime. Thus, Roberta's claim is for $1,834.60 overtime pay plus an additional $1,834.60 penalty, a total of $3,699.20.

Alternative Claims

You will note alternative claims (schedules 1C, 2C and 3C), on some weeks. These claims are based on the proposition that an employer may not send an employee out of town and require her to expend her own funds so far in excess of reimbursement for expenses that the employee's wages, after the unreimbursed expenses are deducted, are reduced far below the minimum hourly wage rate. In some weeks the EMPLOYERS did not even pay the legal minimum wages plus overtime.

Class Action

Roberta has brought this action for herself and all other members of the class (photographers) employed by the two defendant corporations, Eastern Photographic Laboratories, Inc. and Heart of America Portraits, Inc. None of you are bound by this action unless you elect to join. Likewise, *you will not benefit from the action unless you elect to join. In other words, you will not collect any money out of this lawsuit unless you consent to be part of the action.*

If your experience has been similar to Roberta's and you wish to join this action, sign and return the enclosed consent form.

Statute of Limitations

Under the Fair Labor Standards Act we can collect back (overtime) pay for two years (three years if we can prove a wilful violation by the EMPLOYERS). Thus, each of you may go back two (or three) years from the day your "consent" is filed in Court. Recoveries for weeks worked before that date are prevented by the Statute of Limitations.

Retaliation

Those of you currently employed by Eastern Photographic Laboratories (or Heart) may naturally be concerned whether you will be able to keep your jobs if you join in this lawsuit. EMPLOYERS are not permitted to retaliate against you for your participation in the claim for overtime wages. The Fair Labor Standards Act states (Section 215a):

It shall be unlawful. . . :

> "(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

Section 216 provides:

> "(a) Any person who wilfully violates any of the provisions of section 15 [29 USCS § 215] shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than

six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

If the EMPLOYERS even threaten to harass, discriminate or to terminate any one of you for consenting to join in this action, you would promptly contact this office. Rest assured that we would immediately bring the matter to the attention of the United States District Court Judge by appropriate motion. We rather doubt that the EMPLOYERS will attempt any such retaliation.

Attorneys Fees

There are no fees whatsoever unless we win or obtain a settlement. Fees will be charged on a contingent fee basis. Federal law provides that the Court "shall award" as additional damages, an amount towards attorneys fees, to be paid by the DEFENDANT EMPLOYER and the Court award shall be applied toward the fee. Court costs, which in a class action are nominal for each person, would come out of the recovery. Our best estimate is that liability for court costs and expenses would run between $1.00 and $10.00 per person.

Documentation of Claim

Roberta's schedules which you will find attached to the complaint show the way that we have calculated the amounts owing for overtime. Many of you may not recollect off-hand what town you "shot" during a particular week, nor the store hours, nor the mileage, etc. You are not all required to prove your cases with the exactitude exhibited by Roberta's schedules. The courts recognize that it is the EMPLOYERS' obligation to require time records and to keep time records; and we believe that in this case your

EMPLOYERS neither kept nor required time records. Under these circumstances, the courts only expect the employees to do the best they can in piecing together the schedules and recalling events. You should do your best to locate *all* of your records, including the various pay slips and including the commission sheets and your pink copies of the weekly reports. We will seek (under court order) the EMPLOYERS' copies of all these records. We will give you all of the assistance that you need in preparing your itemized claim. We expect that even those of you who have little or no recollection, and who have no records, may join in the class and make reasonably full recovery of your just damages.

Take as much time as you need to make a careful, intelligent decision. You may wish to consult your own attorney. If we may answer any questions you may call us collect. Indicate when you place the call that you are a photographer.

If you determine to join, send in your consent form signed, accompanied by the preliminary information sheet.

A. Reynolds Gordon of Gordon & Hiller
(203) 335-1183

Arthur A. Hiller of Gordon and Hiller
(203) 335-1183

Lucille Joy Becker (Of counsel)
(203) 268-4557

FOR USE OF GORDON & HILLER

PHOTOGRAPHER'S CLASS ACTION
PRELIMINARY INFORMATION SHEET

NAME: TEL. No. ( )

PRESENT ADDRESS:

ALTERNATE ADDRESS:
(in case you are unable to reach me at the above address)

NAME: c/o TEL. No. ( )

ADDRESS:

DATES OF EMPLOYMENT WITH DEFENDANT EMPLOYER (if earlier than July 1975 specify actual dates as closely as possible)

ANY QUESTIONS OR COMMENTS:

CONSENT OF EMPLOYEE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Civil Action No. B78-252

Date:

ROBERTA BRAUNSTEIN,
Plaintiff,

vs.

EASTERN PHOTOGRAPHIC LABORATORIES, INC.
HEART OF AMERICA PORTRAITS, INC.,
Defendants.

The undersigned ....., a present/
Print Name
former employee of the DEFENDANT EMPLOYERS Eastern Photographic Laboratories, Inc. and/or Heart of America Portraits, Inc., hereby consents to become a party plaintiff in the above action.

.....
Signature

Address:

.....

.....

Supreme Court, U. S.
FILED
APR 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1306

EASTERN PHOTOGRAPHIC LABORATORIES, INC., AND HEART OF AMERICA PORTRAITS, INC.,
Petitioners,

vs.

ROBERTA BRAUNSTEIN,
Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHAUN S. SULLIVAN
195 Church Street
New Haven, Connecticut 06508
(203) 789-1511

Of Counsel:

WILLIAM J. DOYLE
MARSHALL B. BABSON
195 Church Street
New Haven, Connecticut 06508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1306

EASTERN PHOTOGRAPHIC LABORATORIES, INC.,
AND HEART OF AMERICA PORTRAITS, INC.,
Petitioners,

vs.

ROBERTA BRAUNSTEIN,
Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Eastern Photographic Laboratories, Inc., and Heart of America Portraits, Inc. (hereinafter collectively referred to as "Eastern") file the following supplemental brief in support of Eastern's pending petition for a writ of certiorari on the sole issue of whether, as respondent contends, the present appeal is moot.

The Appeal Is Not Moot

Notwithstanding the fact that on March 21, 1979, the District Court ordered that notice be mailed to other present and former Eastern employees, it is clear that the present appeal is not moot.

On April 2, 1979, plaintiff filed the annexed motion to compel, thereby once again seeking the District Court's assistance in effectuating the issuance of notice to other present and former Eastern employees. See plaintiff's interrogatories dated July 5, 1978, Appendix p. 1a and plaintiff's motion to compel dated April 2, 1979, Appendix p. 3a. The filing of the present motion makes it abundantly clear that (1) there remains a substantial controversy between the parties over the appropriateness of notifying potential class members of the pendency of this section 16(b) Fair Labor Standards Act action, and (2) the District Court continues to be called upon to exercise its powers to effectuate the giving of notice in this section 16(b) Fair Labor Standards Act action. Moreover, the filing of the present motion demonstrates that this is an issue "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515 (1911); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). *See Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975); *cf. Weinstein* v. *Bradford*, 423 U.S. 147, 148-49 (1975); *Preiser* v. *Newkirk*, 422 U.S. 395, 401-03 (1975). It is clear, therefore, that the issue of whether or not the District Court has the power to advise potential litigants of the pendency of the present action and of their right to join such action is not moot.

Respectfully submitted,

SHAUN S. SULLIVAN,
Attorney for Petitioners.

Of Counsel:

WILLIAM J. DOYLE
MARSHALL B. BABSON

April 9, 1979

APPENDIX

Plaintiff's Initial Request for Interrogatories

(Filed—July 9, 1978)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. B78-252

ROBERTA BRAUNSTEIN,

Plaintiff,

vs.

EASTERN PHOTOGRAPHIC LABORATORIES, INC.
HEART OF AMERICA PORTRAITS, INC.,

Defendants.

The Plaintiff seeks and requests the following information of the Defendants:

"IDENTIFY" means identification of name, all home or business addresses known to you, including any alternate or forwarding address and last known address, social security number, and telephone numbers.

1. Identify each person presently employed by you as of the date of the Answers to these Interrogatories, giving dates of employment (including initial orientation and training).
2. Identify each person employed by you on or after July 1, 1975 but not presently employed by you (as of the date of Answers to Interrogatories), giving

Plaintiff's Initial Request for Interrogatories

beginning and ending dates of employment, starting with initial orientation and training.

PLAINTIFF

By: A. REYNOLDS GORDON, Attorney
Gordon & Hiller
855 Main St., Suite 945
Bridgeport, CT 06604

July 5, 1978.

Motion to Compel

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. B78-252

ROBERTA BRAUNSTEIN,

Plaintiff,

vs.

EASTERN PHOTOGRAPHIC LABORATORIES, INC., et al.,

Defendants.

The Plaintiff in the above entitled matter respectfully represents:

1. Under date of July 5, 1978 the Plaintiff filed her initial request for interrogatories.

2. On said date the Court granted (without prejudice) the Plaintiff's motion to shorten the time to answer said interrogatories to ten days.

3. On July 24, 1978 the Defendants objected to said request for interrogatories, the objections were overruled on July 27, 1978.

4. On July 21, 1978 the Defendants provided lists of names and addresses of employees.

Motion to Compel

5. The Defendants did not provide any answers under oath as required by Federal Rules of Civil Procedure, and the list provided did not contain dates of employment, alternate addresses, telephone numbers and social security numbers, all as required on said initial request for interrogatories, and some of the zip codes were unstated.

6. The Plaintiff sent out the Court-authorized notices to 463 employees on March 21, 1979.

7. As of April 2, 1979 87 notice envelopes have been returned to the Court Clerk's office for lack of proper address.

8. The Defendants have not brought the list of employees up to date.

THEREFORE the Plaintiff respectfully requests that the Defendants be COMPELLED to provide:

1. As to each employee whose notice envelope was returned by the Postal authorities to the Clerk of this Court:

a. An oath by the Personnel Manager that the address given is accurate and that there is no alternate or forwarding address.

b. The employee's social security number.

c. Telephone numbers.

d. Dates of employment.

2. As to each employee whose consent is filed, the dates of employment of that employee, giving beginning and ending dates of employment, starting with initial orientation and training.

Motion to Compel

3. Full answers to the Initial Request for Interrogatories as to each photographer employed since July 20, 1978 and up to the present time.

THE PLAINTIFF

By: A. REYNOLDS GORDON
Of: Gordon & Hiller
855 Main St., Suite 945
Bridgeport CT 06604

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed postage prepaid to all counsel of record.

A. REYNOLDS GORDON

April 2, 1979.

Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1306

EASTERN PHOTOGRAPHIC LABORATORIES, INC., and HEART OF AMERICA PORTRAITS, INC.,
Petitioners,

vs.

ROBERTA BRAUNSTEIN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 24, 1979

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THIS APPEAL IS MOOT

The Court of Appeals having affirmed the District Court Order of Notice, and multiple applications for stays having been denied, by the Court of Appeals (twice), by the District Court, and by Mr. Justice Marshall, the Notice issued by the District Court being mailed by counsel to all 463 members of the FLSA class shortly after 5 p.m. on March 21, 1979, makes this appeal moot.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1306

EASTERN PHOTOGRAPHIC LABORATORIES, INC., and HEART OF AMERICA PORTRAITS, INC., Petitioners,

VS.

ROBERTA BRAUNSTEIN, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

I. The decision of the District Court, entered in open court on July 27, 1978, not printed in the Petitioners' Appendix, appears in the Respondent's Appendix, attached hereto (App.47a-54a).[1]

1. Appendix references are as follows:
(Jt. App.) refers to the Joint Appendix filed with the Court of Appeals.
(Pet. App.) refers to the Appendix which has been filed as a portion of Eastern's Petition for Writ of Certiorari.
(App.) refers to the Appendix attached hereto as a part of the Respondent's Brief in Opposition to Petition for Writ of Certiorari.

II. ISSUES:

1. Does the District Court, in a statutory non-Rule 23 FLSA class action, have inherent power to determine and fashion procedures, where Congress was silent, in order to carry out the expressed remedial purposes of the Act?

2. Would the humanitarian and remedial purposes of the Fair Labor Standards Act be furthered and the class action authorized by 29 U.S.C. § 216(b) be made more effective by the utilization of notice to make absent class members aware of the action?

3. Did the District Court abuse its discretion in ordering or permitting the Plaintiff's counsel to give notice to the section 216(b) class?

4. Could the Court constitutionally restrain the Plaintiff or her counsel from communicating with other potential members of the class in order to invite their participation in the action?

5. Did the District Court abuse its discretion in refusing to restrain the Plaintiff's attorneys from using a list of employees voluntarily produced by Defendants without timely objection, to communicate with the class of potential plaintiffs?

6. Is the appeal moot?

III. STATEMENT OF THE CASE

The Plaintiff ROBERTA BRAUNSTEIN brought this action by verified complaint against her former employers claiming violations of sections 206 and 207 of the Fair Labor Standard Act consisting of unpaid overtime compensation and minimum wages, and requesting the back pay due, plus liquidated damages, attorney's fees and costs. (Jt. App. 4a - 9a)

The Plaintiff brought this action on behalf of herself and all other employees similarly situated, as a class action expressly authorized by 29 U.S.C. § 216(b). (Jt. App. 4a)

The class whom she represents consists of approximately 463 other photographers, present and former, employed during the past three years by the Defendants. These photographers are located all over the country. They are not organized into any union. (Jt. App. 25a - 26a)

Simultaneously with the filing of the complaint the Plaintiff filed a Reques

for Interrogatories (Jt. App. 13a) together with a motion, pursuant to Federal Rule 33a, to shorten the time for compliance with interrogatories to ten days from the service of the complaint. (Jt. App. 11a - 12a) The Plaintiff requested the names and addresses of the employees in order to give these members of the class notice of the pendency and nature of the action and to invite them to join as members of the class. (Jt. App. 11a) Under 29 U.S.C. § 216(b) while one employee may bring an action as representative of all other employees similarly situated, none of those other employees becomes a party plaintiff unless he or she consents in writing to join the action.

The motion to shorten time was granted by the Court on July 5, 1978 without prejudice. (Jt. App. 11a)

On July 7, 1978 service of all papers was accomplished upon Attorney Richard Gilland, who accepted service for the Defendant employers. (Jt. App. 10a) The Plaintiff filed her Motion to Compel Answers to Interrogatories on July 18, 1978. (Jt. App. 14a) On July 21, 1978 Attorney

Gilland filed his appearance on behalf of the Defendant employers (Jt. App. 47a), and on the same day Attorney Gilland voluntarily (and without objection) delivered the requested list of employees to Plaintiff's counsel. (Jt. App. 28a, 31a, 47a, 48a)

On July 24 new counsel objected orally to the production of the list of employees and sought an order that no notice be given. This oral motion was reduced to writing on July 26, 1978. (Jt. App. 16a)

No less than seven times on oral argument Defendants told the District Court that they were not taking the position that notice or any other form of communication between the Plaintiff or Plaintiff's counsel and the absent members of the class was improper, unethical, or that it should be prohibited. (Jt. App. 30a, 32a, 33a, 34a, 43a, 44a, 45a) The issue was solely one of discovery. (Jt. App. 29a, 30, 31a, 32a, 33a, 34a, 45a)

The District Court's Action

On July 27, 1978 the District Court denied in toto (App. 51a, 55a) the Defendants' motion, which sought:

1. The objection to discovery.

2. That the list be returned.

3. That the Plaintiff and her attorneys be prohibited from using the list.

The District Court then went on to order or permit the Plaintiff to give notice, the form to be subject to Court approval.

In so doing, the District Court:

1. Found that the list of employees was voluntarily turned over to Plaintiff's counsel. (App. 47a - 48a)

2. Determined that the objection to discovery was untimely. (App. 53a)

3. Declined to waive the untimeliness. (Jt. App. 31a - 32a)

4. Declined to order a return of the list. (App. 51a)

5. Declined to prohibit the Plaintiff or her attorneys from making use of the list to communicate with the class members. (App. 51a)

6. Determined that the Court had the power to order or permit notice. (App. 49a, 51a)

7. a. Found that the effectiveness

of the Fair Labor Standards Act opt-in procedure depends on whether the potential plaintiffs are aware of the suit, and that notice was appropriate under the statute. (App. 49a, 52a)

b. Found that the potential plaintiffs in the instant action typified the unorganized, the ignorant, the fearful and the timid workers whom the Fair Labor Standards Act was designed to protect. (App. 50a)

c. Found that the Fair Labor Standards Act is a remedial statute. (App. 50a)

8. Determined that the Court, in the exercise of its discretion, should and would order or permit notice. (App. 51a)

9. Determined that it would review the proposed form of notice before issuance. (App. 54a)

IV. REASONS FOR DENYING THE WRIT

A. There Is No Clear Split Between Circuits Such As To Warrant The Granting Of Certiorari.

In Kinney Shoe Corp. v. Vorhes, 564

F.2d 859 (9th Cir. 1977), the Ninth Circuit Court of Appeals had before it neither the same facts nor the same legal positions as were the basis of the decisions of the District Court of Connecticut and the Second Circuit Court of Appeals in the instant action. In Kinney the Plaintiffs claimed that notice to an FLSA class was appropriate under Federal Rule 23. Further, the Kinney court rejected an argument that due process of law required the issuance of notice.

The instant case instead turned on different issues:

1. The remedial purposes of the Fair Labor Standards Act, as set forth in section D4, infra, none of which was considered by the Kinney court.

2. Kinney ruled that the California District Court did not have the inherent power to order notice because such would be a radical departure from the accepted principles of judicial function. That ruling was made without consideration of:

a. the All Writs Act (28 U.S.C.

§ 1651a) and the Supreme Court cases decided thereunder.

b. District Court findings (such as here exist) that FLSA purposes were best effectuated by issuance of notice.

c. the constitutional line of authority from N.A.A.C.P. v. Button, 371 U.S. 415 (1963, through Bates v. State Bar of Arizona, 433 U.S. 350 (1976), which emasculates the rationale of Judge Wyzanski's decision in Cherner v. Transitron, 201 F.Supp. 934 (D.C. Mass. 1962) and puts the District Court and Court of Appeals rulings in line with, rather than a departure from, accepted principles of judicial function.

3. Moreover, in the instant case the Plaintiff has the list of employees, turned over voluntarily prior to any timely objection. Viewed thusly, the issue became one of restraining the Plaintiff from using the list to communicate with the members of the class.

Neither Schmidt v. Fuller Brush Co.,

527 F.2d 532 (8th Cir. 1975), nor LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975), are in conflict with the rulings of the Second Circuit. Both those cases deal solely with the applicability of F.R. 23 to a section 216(b) FLSA action. A Rule 23 notice was neither sought nor ordered in the instant litigation.

B. This Petition Does Not Present Important Issues Of First Impression.

This Court has already effectively rejected the rationale of Judge Wyzanski's decision in Cherner v. Transitron Electronic Corp. (supra) which frowns on the stirring up of litigation. See Section D8, infra.

Beyond that the issues here involve the District Court's discretionary power over discovery and over procedures where Congress was silent on procedures. See Sections D1, 2, 5, infra.

C. The Decision Of The Second Circuit Is Neither Radical, Nor Does It Apply Beyond The Scope Of Section 216(b).

The legal implications of the Second

Circuit's decision are simply not as presented by the Defendants. This is a Fair Labor Standards Act class action.

United States v. Universal Corp.
344 U.S. 218, 222 (1952)

It is not a permissive joinder action. The Second Circuit, by its decision, does not countenance notice to all persons entitled to permissive joinder in any common law or personal injury action.

The accepted course of judicial proceedings urged by the Defendants and by the Kinney court frowns on any judicial action which would tend to stir up litigation. No longer is that the accepted judicial course. See N.A.A.C.P. v. Button through Bates v. State Bar of Arisona. (Section D8, infra)

Unhampered by the rationale of Cherner v. Transitron, supra, the District Court could properly fashion its own procedures where, as here, Congress was silent on the issue of notice. In so doing, it was appropriate for the District Court to look to the legislative purposes of the Fair Labor Standards Act and to determine, as did the Supreme Court in Brooklyn Bank

v. O'Neil, 324 U.S. 697 (1944), how to best effectuate these purposes. The District Court here determined that notice to the absent class best furthered the statutory objectives which include protection of the ignorant and the timid.

D. The Decision Below Was Clearly Correct And Appropriate.

1. Inherent Power of the Court to Order Notice - All Writs Act.

29 U.S.C. § 216(b) is silent on the question of notice to the class. Congress left this procedural matter up to the Courts.

Where not otherwise provided for by rule or statute, the federal courts have the power to issue such orders as are necessary for the orderly processing of litigation within their jurisdiction. This power is founded in common law, the inherent power of the court. It is confirmed in the All Writs Act, 28 U.S.C. § 1651a.

Harris v. Nelson
394 U.S. 286, 299 (1968)

The statute reads:

". . . the Supreme Court and all

courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions, and agreeable to the usages and principles of law."

28 U.S.C. § 1651a

The statutory language "agreeable to the usages and principles of law" does not require a static concept, but rather contemplates a law which "expands and develops as new problems arise".

Price v. Johnson
334 U.S. 266, 282 (1948)

The term "writs" includes orders of all kinds, such as the discovery ordered in a habeas corpus proceeding by the Court in Harris v. Nelson, supra.

Although Harris and Price are habeas corpus cases, the All Writs Act applies to various types of proceedings, wherever the Court has jurisdiction and the power is needed to serve the ends of justice.

American Lithographic Co. v. Werckmeister
221 U.S. 603, 609 (1911)
(Subpoena duces tecum in civil action)

Bethlehem Shipbuilding Corp. v. NLRB
120 F.2d 126, 127 (1st Cir. 1941)
(Court of Appeals may issue subpoenas in contempt proceedings.)

Section 1651 ". . . is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law'".

Adams v. United States ex rel. McCann
317 U.S. 269, 273 (1942)

Price v. Johnson
334 U.S. 266, 282 (1948)

Indeed, under the authority of 28 U.S. C. § 1651(a) a class action has been permitted in habeas corpus proceedings, not under Federal Rule 23 (which was inapplicable to habeas corpus) but by analogy to the Federal Rules.

Adderly v. Wainwright
58 F.R.D. 389, 393 (D.C. M.D. Fla. 1972)

The court in Wainwright described its decision as a use of its inherent procedural resources.

Id. at 396

2. Federal Rule 83, Omnibus Sentence

Rule 23 being inapplicable to FLSA actions and there being no applicable local rule, the District Court may order notice to the section 216(b) class by virtue of the power given in Federal Rule 83[2] to fashion its own procedures to handle litigation within its jurisdiction.

> "If a procedural detail arises in a case and it is not covered by the Federal Rules or by a standing district court, the district court may provide therefor in such manner as will facilitate the just determination of the action."

7 Moore: FEDERAL PRACTICE - Part 2, ¶83.04
(2nd ed. 1978)

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2. F.R. 83 provides:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

3. Court Powers In Class Action Suits

Under 28 U.S.C. § 2071 the Court of Claims in Quinault Allottee Ass'n & Ind. Allot. v. United States, 453 F.2d 1272, 1274 (Ct. Cl. 1972), fashioned a class action as a procedural technique for enforcing Indian rights to a refund of "administrative charges" by the Bureau of Indian Affairs. Without prescribing a general rule the Court of Claims there permitted a class action, but made it an "opt-in" rather than "opt-out" action and ordered notice.

> "We believe, rather, that they should be given easy opportunity to appear and to include themselves if they desire the advantages (and are willing to bear the risks and costs) of the suit.
>
> Accordingly, we authorize a notice of the pendency of this action to be sent to all Quinault allottees known to plaintiffs (and not already named in the petition). Plaintiffs suggest that this notice be signed and sent by Plaintiffs' counsel, and we are willing that this be done."
> [emphasis added]

Ibid

As an exercise of their power to deal with situations not otherwise provided for by the rules and statutes, the district courts have power to fashion expeditious procedures to achieve the remedial objectives of the Fair Labor Standards Act, provided they are consistent with the expressed intent of Congress.

Rahl: THE CLASS ACTION DEVICE IN EMPLOYEES' SUITS UNDER THE FAIR LABOR STANDARDS ACT
37 Ill. L.R. 119, 132 (1942)

> "The more reasonable view would seem to be that adopted by the majority of courts to date: that the language and intent of section 16(b) are sufficient to provide separate authority for group actions by employees independent of general class action rules in order to permit a more flexible and expeditious procedure."

Ibid

4. Legislative History and Purposes

Where Congress is silent on a particular procedure, the courts will look to the general intent expressed in the statute and the legislative history of the Act.

Brooklyn Bank v. O'Neil
324 U.S. 697, 706 (1944)

The purposes of the Fair Labor Standards Act are set forth in 29 U.S.C. § 202.

After many joint hearings at which a gigantic volume of testimony was presented, including months of debate, Congress enacted the Fair Labor Standards Act in 1938, in pursuance of the objectives and for the reasons set forth therein.

Wecht: WAGE-HOUR LAW (Coverage), at 18, 19 (Jos. Mitchell, pub. 1951)

The findings and purposes of Congress appear in House Report No. 2182, 75th Cong., 3rd Sess., at page 7.

Wecht states further:

"Other purposes variously ascribed to the act by the courts are (1) to secure for those unorganized workers who lack sufficient bargaining power a minimum subsistence wage; . . ." [emphasis added]

Wecht, supra at 27

According to the Supreme Court:

"The legislative debates indicate that

the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population . . ."

Brooklyn Bank v. O'Neil
324 U.S. 687, 707 n.18 (1944)

In 1949 the Secretary of Labor testified before Congress:

"The salient purpose of the act, to insure that employees receive the minimum wages and overtime compensation which the act requires, can only be served completely and effectively when employers cannot be relieved of their obligations through the inertia or ignorance of their employees." [emphasis added]

2 U.S.C. Congressional Service (1949)
81st Cong., 1st Sess. 2247, 2248

The District Court referred to this testimony (App. 50a).

REMEDIAL AND HUMANITARIAN PURPOSES - FURTHEREST REACHES OF LIBERAL CONSTRUCTION

The Supreme Court in 1943 stated:

"But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but

with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner." [emphasis added]

Tennessee Coal Co. v. Muscoda Local
321 U.S. 590, 597 (1943)

In 1958 the Supreme Court said of this statute:

"However, within the tests of coverage fashioned by Congress, the Act has been construed liberally to apply to the furtherest reaches consistent with congressional direction." [emphasis added]

Mitchell v. Lublin, McGaughy & Assoc.
358 U.S. 207, 211 (1958)

Accord, Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843, 846 (8th Cir. 1975).

To construe the Fair Labor Standards Act other than liberally:

"'. . . is to abuse the interpretative process and to frustrate the announced will of the people.'"

Anderson v. Manhattan Lighterage Corp.
148 F.2d 971 (2nd Cir. 1945)

5. The Courts Should Liberally Fashion Procedures For The §216(b) Class Action

The provisions of section 216(b) which permit representative or class suits should be liberally administered by the courts.

Culver v. Bell & Loffland
146 F.2d 29, 31 (9th Cir. 1944)

Barrett v. Nat'l Malleable & Steel Cas. Co.
68 F.Supp. 410, 416 (D.C. Pa. 1946)

Shain v. Amour
40 F.Supp. 488, 490 (D.C. N.D. Ky. 1941)

Speaking of the implementation of procedures for section 216(b) the Seventh Circuit Court of Appeals has said:

". . . the District Court had a wide discretion in shaping up the limits of the suit.

Congress intended to liberalize and relax the procedure for bringing suits to enforce the sanctions of the Act. The procedure was left to the Court's discretion in order that they might intelligently supervise the suits in the interest of justice to the parties under the Act." [emphasis added]

Jumps v. Leverone
150 F.2d 876, 877 (7th Cir. 1945)

Section 216(b) is silent as to whether and how notice is to be given. Likewise, section 216(b) provides for 100% liquidated damages, but was (prior to 1949) silent as to whether this provision could be waived. In determining that issue the Supreme Court in Brooklyn Bank v. O'Neil, 324 U.S. 697 (1944), quoted at length from the only reference to section 16(b) in the Congressional history:

> "Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It is both a commonsense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I

> have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act." [emphasis added] [Statement of Representative Keller]

Id. at 705-706 (footnote 16)

Congress having given no specific direction on the issue of waiver, the Supreme Court looked to the policy considerations behind the Act.

> "In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act."

Id. at 706

So also is the FLSA silent on the issue of notice, but the policy evidenced in the legislative history, purposes and provisions and as recognized by the Supreme Court in Brooklyn Bank, supra, would surely be furthered by the issuance of notice to the class, as the District Court and the Second Circuit Court of Appeals both so found.

(Pet. App. 2a, 3a, App. 49a-52a)

Defendants would have this Court rule that Congress's silence on notice is an affirmative prohibition of notice. However, unless legislation expressly so requires, Courts should not engage in the legal fiction of requiring affirmative action of unaware class members.

6. Congressional Silence May Not Be Construed To Deny Notice.

The Defendants claim that Congressional silence and Congressional amendments since the issuance of court decisions denying notice are to be taken as Congressional approval and adoption of these opinions. The Defendants' claims are unsupported factually. The decisions filed by Defendants denying notice in an FLSA action all came after enactment of the ADEA in 1967. (There were also District Court decisions in favor of notice (Pet. App. 9a-19a). The only appellate decision was the Kinney case in October 1977. In 1978 Congress amended the ADEA simply to expressly codify the decision of the United States Supreme Court in Lorillard v. Pons, 434 U.S.

575, 580-81 (1978). By that amendment Congress did not re-enact the FLSA, nor did it incorporate the FLSA into other legislation. The incorporation was done in 1967 when Congress made FLSA procedures expressly applicable to ADEA actions.

Under the rules of construction set forth in Lorillard v. Pons, supra, the 1978 amendment indicates nothing concerning Congressional intent on notice under section 216(b) because it was not shown that Congress was aware of the Kinney decision. Moreover, the 1978 amendment was to ADEA, not the Fair Labor Standards Act.

Except in instances involving re-enactment of a statute or incorporation of a statute by reference in subsequent legislation, this Court, in applying the "Congressional silence" rule, has indicated that where the courts have interpreted a statute and this interpretation has been brought to the attention of Congress, and in the face of this interpretation Congress has left the statute as it was, the Court may (but is not required to) consider this an indication of Congressional intent.

Boys Markets v. Clerks Union
398 U.S. 235, 240 - 242 (1969)

Georgia v. United States
411 U.S. 526, 532, 533 (1972)

Alstate Construction Co. v. Durkin
345 U.S. 13, 16, 17 (1952)

Blau v. Lehman
368 U.S. 403, 412, 413 (1961)

Such is simply not the case here.

7. Statutory Class Action, Not Merely Permissive Joinder

Congress meant to accomplish something by its representative action provision. This was not merely a device for permissive joinder, Congress would and could have said:

> "Any other employees similarly situated may join in such action as party plaintiffs."

Congress did not so state. Instead, Congress has inserted and maintained in section 216(b) the following language:

> ". . . action to recover such liability may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such a consent is filed in the Court in which such action is brought.
>
> 29 U.S.C. § 216(b)

The FLSA thus provides for "individual or class actions for restitution and damages". [emphasis added]

United States v. Universal Corp.
344 U.S. 218, 222 (1952)

8. Notice By The Court Will Not Constitute An Improper Stirring Up Of Litigation

The authorities in opposition to notice, as their primary reason for denying notice, state that were the court to order notice it might constitute a solicitation or an improper stirring up of litigation.

While such an objection may have been supported by prevailing judicial opinion a number of years ago,[3] nevertheless, such a philosophy no longer prevails. In a line of cases starting in 1963 (or prior there-

3. Cherner v. Transitron Electronic Corp., 201, F. Supp. 934 (D.C. Mass. 1962)

to) and continuing through 1978 this Court has increasingly recognized the right of the common people, including the poor, the working, and the ignorant, such as the unorganized employees in the instant case, to be fairly represented in lawsuits authorized by Congress and to benefit from collective or group endeavors to gain access to the courts; and the Court has given First Amendment protection to those whose activities furthered these purposes, even when such activities were termed by their adversaries "solicitation" or "stirring up of litigation".

NAACP v. Button
371 U.S. 415, 438-440 (1963)

Railroad Trainmen v. Virginia Bar
377 U.S. 1, 7 (1964)

Mine Workers v. Illinois Bar Assn.
389 U.S. 217, 222-224 (1967)

"The common thread running through our decisions in NAACP v. Button, Trainmen, and United Workers, is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment . . ."

United Transportation Union v. Michigan Bar
401 U.S. 576 at 585 (1971)

That common thread was recognized in Bates v. State Bar of Arizona, 433 U.S. 350, 376 (1976). In affording First Amendment protection to an attorney who advertized, the Court expressed concern for the interest of the listener.

Id. at 364

The Court stated:

"Advertising is said to have the undesirable effect of stirring up litigation. The judicial machinery is designed to serve those who feel sufficiently aggrieved to bring forward their claims. Advertising, it is argued, serves to encourage the assertion of legal rights in the courts, thereby undesirably unsettling societal repose. There is even a suggestion of barratry. [citations omitted]

But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. As the bar acknowledges, 'the middle 70% of our

population is not being reached or served adequately by the legal profession'."

Id. at 375, 376

The Bates court footnotes this argument by raising that common thread previously noted.[4]

The old position that it is better to let sleeping plaintiffs sleep no longer prevails. The Court of Appeals agreed. (Pet. App. p. 6a)

4. "Decided cases reinforce this view. The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment. See United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971); Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222-224 (1967); Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 7 (1964); NAACP v. Button, 371 U.S. 415, 438-440 (1963). It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups." [emphasis added]

Id. at 376 (n. 32)

The District Court here recognized:

"The statute goes on to provide for the opting-in of employees who wish to join in the suit. The effectiveness of the opt-in procedure is dependent on whether potential plaintiffs are aware of the suit." [emphasis added]
(App. 49a)

Additionaly, the District Court stated of the 463 photographers who are members of the class:

"Also, potential plaintiffs here are precisely the type the law was designed to protect, including, among others, the unorganized, the ignorant, the fearful and the timid, who, not knowing the precise language of the statute, may fear reprisal if they act alone." (App. 50a)

The notice proposed is for plaintiffs in a statutory "class" action, not a personal injury action. The very nature of a class action is that it stirs up and brings to justice the claims of many.

In light of the Supreme Court decisions in Button, Trainmen, Mine Workers, Transportation, and Bates, and the Supreme Court

decisions in Ohralik and Primus it would be proper, appropriate and within the protection of the First Amendment for plaintiff's counsel to give notice in such a statutorily authorized class action.

Ohralik v. Ohio State Bar Association
46 L.W. 4511 (May 30, 1978)

In Re Primus
46 L.W. 4519 (May 30, 1978)

Notice to the section 216(b) class, even by counsel rather than by the Court, more closely fits the Primus situation and satisfies the "adverse consequence" tests in Primus (46 L.W. 1425, 1425).

Certainly, the Court, in the exercise of its functions in supervising litigation properly before it, may order or permit the plaintiff to notify the class of the existence of the litigation and of their legal rights and means of effectuating them.

Furthermore, section 216(b) provides for counsel fees.

> "As an indication of its concern with the effective presentation of civil rights cases, Congress has provided

> for the allowance of counsel fees in many situations. This action tends both to negate any intention of Congress to authorize a local rule of court that unduly infringes upon free speech in that sphere as well as to remove one of the reasons for controlling communication with potential class members. A broad interpretation of local Rule 34 in the factual posture of this case also runs afoul of the right to group legal action directed to the preservation or protection of the legal interests of the organization's members. [emphasis added]

Rodgers v. U.S. Steel Co.
508 F.2d 152, 166 (3rd Cir. 1975)
(Concurring opinion of Weis, J.)

This disposes of the one difference between the instant case and Primus. Public interest litigation, such as that authorized in the Civil Rights Act and in the Fair Labor Standards Act, quite properly affords counsel fees to the successful plaintiff's attorney. That such fee is provided for removes any objection that the proposed notice amounts to solicitation for a fee by an attorney.

SUMMARY OF SECTION D

The common-law, the All Writs Act, and FR 83 give the District Court discretion and power to fashion its own procedures where Congress is silent on procedures. Liberal construction of the Fair Labor Standards Act requires that the statutory class action be furthered, not discouraged. Notice best effectuates the remedial purposes of the Fair Labor Standards Act because notice makes these unorganized workers aware of their rights, aware of their opportunity to join this statutory class action.

The ancient rule frowning on any activity which might tend to stir up litigation must give way to the policy (expressed by this Court in Button through Bates) favoring collective activity involving the dissemination of information to groups to help them gain meaningful access to the courts.

E. This Appeal Is Moot Because The Plaintiff Already Has The List And May Send Out Notice.

Before The District Court the Defendants addressed themselves only to the question of discovery and the use of the discovered materials. (see sec. III, supra) Before the Court of Appeals and in this Petition the Defendants have attempted to shift their appeal to grounds other than those urged upon the District Court. The Defendants' appellate briefs speak not of discovery, but solely of the right of the Court without regard to discovery to permit or order the Plaintiff to give notice.

This list was turned over voluntarily. The Plaintiff has the list. The Defendants did not (nor do they now) claim that it would be improper or unethical for the Plaintiffs to give notice to the potential members of the class. (supra) If such a claim were made, nevertheless, under the following cases the Court may not prohibit the Plaintiff or her counsel from issuing such a notice.

Rodgers v. United States Steel Corp.
508 F.2d 152, 163 (3rd Cir. 1975)

Coles v. Marsh
560 F.2d 186, 188-189 (3rd Cir. 1977)
(cert. den. 424 U.S. 985)

The District Court declined to so restrain the Plaintiff or her counsel.

Constitutional issues aside, the only claims advanced to the District Court related to discovery. The Court exercised its discretion in its denial of these untimely claims. This appeal raises no discovery issue, and no claim is here made that the Plaintiff may not communicate with the potential members of the class. This appeal therefore become moot.

V. CONCLUSION

The essence of the Defendants' objection to notice is that the notice is simply not provided for in the statutory scheme. To the contrary:

1. Nowhere in the United States Code, the Federal Rules of Civil Procedure, or the Local Rules of Civil Procedure is there any provision prohibiting the District Court from ordering or permitting notice.

2. The FLSA is silent on the issue of notice.

3. The District Court has the power from various sources to order or permit notice to the absent class.

4. Notice will effectuate the purposes of the Act and will further the policy espoused by the Supreme Court in recent cases, promoting collective activity undertaken to obtain meaningful access to the courts.

5. The order of notice was within the discretion of the District Court.

Respectfully submitted,

A. REYNOLDS GORDON

ARTHUR A. HILLER

Attorneys for Respondent.

Of Counsel:

LUCILLE J. BECKER

March 24, 1979

APPENDIX

(Reprint of Joint Appendix, Pages 47a - 54a, from the Court of Appeals, a certified copy of which has been filed with the Supreme Court of the United States.)

THE COURT: Well, lest there be any mistake about the prior proceedings herein, this action was initiated by a complaint filed in the clerk's office on July 5th of this year, accompanied by a summons and request for interrogatories, which are the interrogatories involved here, and a motion to shorten time and order on the same.

The marshal's return of notice, which was filed on July 11th, indicates that service was made on Attorney Richard Gilland of all those items on July 11th, 1978. That would have included the motion to shorten time to interrogatories which was granted by me without projudice. I want to make it clear that the motion to shorten time was granted, and nothing else.

On July5th, 1978 the motion to shorten the response time was granted because the statute of limitations was running as to various potential members of the class.

The first response th : I am aware of to this motion was after an intervening motion to compel by plaintiff's counsel was filed. I should note that I have yet to rule on the motion to compel. The list of the names and addresses of the people in question were handed to plaintiff's counsel by Mr. Gilland who had filed an appearance in this action on July 21st. This also occurred on July 21st, as I understand it, and later in the day Wiggin and Dana entered the picture. In

fact, I believe a hearing which had been tentatively scheduled on the motion to compel was cancelled on the basis that it was moot pursuant to a phone call to my chambers. In place of the hearing a chambers conference was scheduled for Monday, the 24th of July. On that day I entered an order here in court after the chambers conference. There never was any objection to the expedited time for responding to the interrogatories either by way of production or objection, and the names and addresses were voluntarily turned over before the Court had before it for decision fully the motion to compel.

On the question, then, of the use to be made, if any, of that production it seems to the Court that there are really two issues here. First, can this Court order the circulation of notice to potential members of the Section 216(b) class?

Secondly, once a plaintiff has received a list of employees who may wish to opt into the class, can this Court prevent the use of the list without violating plaintiff's First Amendment rights?

As to the first issue I find the precedent cited by defendants, although voluminous, unpersuasive. I agree that, because of the absence of any res judicata effect, the due process clause does not compel notice to potential class members. However, the language of 29, U.S.C., Section 216(b)

indicates that an employee can bring another suit under the Fair Labor Standards Act in behalf of himself and "other employees similarly situated."

The statute goes on to provide for the opting-in of employees who wish to join in the suit. The effectiveness of the opt-in procedure is dependent on whether potential plaintiffs are aware of the suit. Although Section 216 does not specifically provide for the giving of notice to potential plaintiffs, the Court believes that it is within its discretion to permit such notice to be given.

In arriving at this conclusion the Court is aware that the Fair Labor Standards Act does not authorize the use of Rule 23. It does not follow, however, that because the class action procedure provided for in Section 216(b) is different from a Rule 23 class action procedure that the Court is without the power to order notice for a suit brought pursuant to Section 216.

Defendant's counsel quotes at length from Judge Wyzanski's opinion in Turner versus Transitron Electronics Corp., 201, F. Supp., 934, District of Massachusetts, in 1962. It should be noted noted that while Judge Wyzanski refused to allow notice to be given to members of a spurious class, in that case he expressly stated that he assumed the Court had the power to order the notice to potential class members at

page 935, and then went on to decide not to exercise his discretion to enter such an order. However, the Court takes issue with that honorable judge's assessment of the controlling policy considerations. The policy considerations supporting notice are numerous. They include, among other things, the remedial objective of the Fair Labor Standards Act, as this objective was articulated as far back as the Secretary of Labor's statement to Congress in 1949. Also, potential plaintiffs here are precisely the type the law was designed to protect, including, among others, the unorganized, the ignorant, the fearful and the timid, who, not knowing the precise language of the statute, may fear reprisal if they act alone.

I also believe that the liberalization of class action procedures generally suggests that notice here is an appropriate method of alerting potential class members.

In addition, the widespread rejection of the notion that it is better to let sleeping plaintiffs sleep than to permit the potential stirring up of litigation is a factor which has weight with the Court. I believe the Supreme Court has rejected the position taken by Judge Wyzanski in its recent decisions in Bates v. State Bar of Arizona and In Re: Primus.

I should note in that connection that the proposal that the plaintiff wishes to accomplish here is not, in my view,

stirring up of litigation in the traditional sense. It, rather, should tend to dispose in one existing action, perhaps, of all the claims of the plaintiffs and the defenses, if any, thereto.

With respect to the second question, whether plaintiff may use the names obtained in discovery, the Court believes that In Re: Primus does not bar a Court order preventing plaintiff from using these names. The Supreme Court's decision in In Re: Primus emphasized the plaintiff's right to associate "as a form of political expression," and the fact that a non-profit organization was involved. Neither factor is inolved here and this Court is not inclined to expand the narrow scope of the Supreme Court's holding.

Thus, defendant's objection to discovery and notice to potential class members is denied. I believe that the two issues outlined here are appropriate ones, however, for interlocutory appeal under 28, United States Code, Section 1292(b) and I will enter an order today making the necessary finding.

Although the cases brought to my attention universally indicate that notice to potential members of a Section 216 class is inappropriate, I believe the giving of such notice should be within the trial judge's discretion. This issue is well framed here and the Court of Appeals will be in a position to rule dispositively for this circuit.

That ends the Court's ruling. What is your pleasure, gentlemen, on the procedures to be followed to, first of all, stay any notice pending the Court of Appeals action, expediting the appeal?

MR. SULLIVAN: Just one question with regard to your Honor's decision. With regard to the second issue you are taking the position that under In Re: Primus notice would be inappropriate here?

THE COURT: No. I'm saying that notice is appropriate under the statute and I do not believe that I need, really, to reach -- or, certainly, to extend the very narrow holding of In Re: Primus to get to the First Amendment question.

MR. GORDON: Your Honor, perhaps, as to procedures from here, your Honor asked us to address ourselves, perhaps we should -- it could be discussed in chambers.

THE COURT: It's all right with me, but I want on the record that I will stay any proceedings pursuant to this order, and I hereby do so on the assumption that there will be an expedited appeal, and expedited as fast as possible, because there may be people who may have legitimate claims, particularly time affirmed, whose rights may be running.

MR. SULLIVAN: Yes, your Honor, we, of course, would request such a stay and we intend to take -- I will

discuss it with my clients, but I think that we will intend to -- do intend to pursue an appeal. And if we do, we would pursue it on an expedited basis.

THE COURT: I think we can discuss the expedited basis in chambers, and if at any time anybody wants to ask me to modify the conditions under which the appeal is being taken, I will hear them, of course.

MR. SULLIVAN: One other question, your Honor, with regard to your ruling this morning. Is it your Honor's position that because notice is appropriate, in your Honor's judgment, under Rule -- in a 216(b) class action that discovery may also be had in order to accomplish that notice?

THE COURT: Well, my position on the discovery question is twofold: One that the objection -- and I, again, want the record to be clear that you or your law firm were not involved -- was not timely made, and, secondly, were it timely made, I would order the production for the purposes indicated in my ruling.

MR. SULLIVAN: Thank you, your Honor.

THE COURT: Is there anything further at this time? I am expressly not ruling on any proposed notice to the class as to form at this time.

MR. SULLIVAN: Well, the record should reflect, I guess, your Honor, that you do have in your possession --

although I do not -- the proposed notice for your review, is that correct?

THE COURT: I do have a proposed notice, which I was told you were advised of but not necessarily the contents of.

MR. SULLIVAN: I do not have the contents, your Honor. Is it the Court's intention if there is an affirmance to review that proposed notice?

THE COURT: I have already looked at it, but it would have to be -- I would hope that we could get concurrence from counsel, if there is affirmance, as to the form the notice should take. And I would hope counsel would work that out as best they could among themeselves. What problems are left for me to resolve, I will resolve. In the meantime, we will assemble in chambers briefly on the appeals situation.

-pOo-